Supreme Court, U.S.
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In the

Supreme Court of the United States

DANA J. RITCHESON,

Petitioner,

v.

C.C. SERVICES, INCORPORATED,
a/k/a Country Companies Insurance Company,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do the texts of Title VII and the Age Discrimination in Employment Act permit employers to discriminate on the basis of sex and age provided the employers' actions do not rise to a threshold level of adversity?

2. Do Title VII and the Age Discrimination in Employment Act permit employers to base transfer decisions, particularly with regard to applications for transfer to competitively bid vacancies, on age and sex?

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OPINIONS BELOW

The opinion of the court of appeals is not reported but found at 79 Fed.Appx. 927 (App., p. 1a). The opinions of the district court (App., p. 8a and App., p. 11a) are unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 30, 2003. Appendix ("App."), p. 7a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are portions of the Age Discrimination in Employment Act, 29 U.S.C. § 623 (a)("ADEA"):

§ 623. Prohibition of age discrimination

(a) Employer practices.

It shall be unlawful for an employer--

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

and portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)("Title VII"):

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices.
>
> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

> individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This case presents an issue of broad importance to the enforcement of the two main federal anti-discrimination statutes, Title VII and the ADEA, with far-reaching implications because Title VII serves as the model for the courts' interpretation of other anti-discrimination statutes.[1] The Seventh Circuit and other circuit courts,[2] have given life to a doctrine not found in the language of the statutes or in this Court's decisions: the requirement that in order to vindicate rights under those laws. employees must prove that they were

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[1] *See, e.g. Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001)(American With Disabilities Act, 42 U.S.C. § 12101, *et seq.*); *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 806 (7th Cir. 1999) *cert. denied*, 530 U.S. 1204(2000)(42 U.S.C. § 1981); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 794 (6th Cir. 2000)(42 U.S.C. § 1983 equal protection claim).

[2] *E.g., Stewart v. Ashcroft*, 2003 U.S. App. LEXIS 26165 (D.C. Cir. Dec. 23, 2003); *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1217 (10th Cir. 2003); *Gorski v. N.H. Dep't of Corr.*, 290 F.3d 466, 475 (1st Cir. 2002); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 885 (6th Cir. 1996); *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995)("ultimate employment decision"); *Torre v. Casio, Inc.*, 42 F.3d 825, 831 n.7 (3d Cir. 1994); *Page v. Bolger*, 645 F.2d 227 (4th Cir.) *cert. denied*, 454 U.S. 892 (1981)(action under § 717 of Title VII, requiring "ultimate employment decision").

victims of discrimination *plus* an "adverse action." The troublesome result is that employers who blatantly discriminate against their employees can be immune from legal redress.

I. Factual Background

Petitioner, Dana Ritcheson, had been employed by Respondent C.C. Services since November 1979. In June 2000, when Ritcheson was working as a Property Specialist in the Las Vegas, Nevada office, C.C. Services posted a vacancy for a Property Specialist job in Vienna, Illinois, and Ritcheson applied. Her competitor for the position was a younger male, Michael Duncan, who held a lower level job and had less experience with the company. App., pp. 2a, 18a-19a. Ritcheson was interviewed twice. App., p. 16a. After her second interview, the supervisor of the Vienna office, Allan Konemann, told his boss (who was the ultimate decision-maker), Leo Stephan, that he preferred Ritcheson based on her overall experience. App., p. 17a. Despite Konemann's recommendation, Stephan selected Duncan for the vacancy and told Konemann that he should "be for this promotion" and that it was a "good opportunity for a young man." App., pp. 20a-21a. Stephan claims to have selected Duncan for the position over Ritcheson because he was concerned that Ritcheson lacked the experience and ability to be able to handle larger files. App., p. 28a.

II. Proceedings Below

Ritcheson filed suit claiming that C.C. Services discriminated against her based on her age and gender in its decision to select Duncan for the open Property

Specialist position.[3] C.C. Services moved for summary judgment, arguing that its decision to promote Duncan rather than award the position to Ritcheson was not an "adverse action" and therefore was not unlawful either under Title VII or the ADEA. The district court denied C.C. Services's motion, finding that "the employment decision in this case [was] akin to a failure to hire or promote." App., p. 13a.

C.C. Services then moved for reconsideration in light of the Seventh Circuit's decision in *Grayson v. City of Chicago*, 317 F.3d 745 (7th Cir. 2003).[4] The district court granted C.C. Services's motion, reasoning that it could not distinguish the facts in this case from those in *Grayson* in any material way. App., p. 9a. Noting that Ritcheson was seeking a position in a different location and in *Grayson* the jobs were in the same location, the district court nonetheless found, "in both cases, the employees sought essentially the same job that they held before and after the employment decision was made. Therefore, the rejection of their applications was not a materially adverse employment decision." App., p. 9a.

The Seventh Circuit affirmed, holding that because Ritcheson could not show that she would have experienced anything more than a minor change in working conditions as a result of the transfer from Las

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[3]Ritcheson sued for retaliation as well, but did not pursue that claim on appeal.

[4]*Grayson*, decided only days after the district court's initial summary judgment ruling, involved two applicants for what was essentially their own job, but with a different title.

Vegas to Vienna, her claim did not rise to the level of an adverse action and that she therefore could not establish a violation of either Title VII or the ADEA. App., pp. 4a-5a. The Seventh Circuit distinguished the facts from those in *Maddow v. Procter & Gamble Co., Inc.*, 107 F.3d 846, 852-853 (11th Cir. 1997) in which the Eleventh Circuit held that requiring a transfer can be a constructive discharge, which is actionable under the ADEA. The distinction, according to the Seventh Circuit, was that in *Maddow* "the employer was highly likely to offer the employee a job, despite knowing she would work only in Atlanta." App., pp. 5a-6a.

III. Federal Jurisdiction

Federal court jurisdiction was based on 28 U.S.C. §1331 (federal question), 28 U.S.C. §1343(a)(4) (protection of civil rights), 42 U.S.C. § 2000e-5(f)(conferring jurisdiction of district courts on cases brought pursuant to Title VII), and 29 U.S.C. § 626 (conferring jurisdiction on courts of competent jurisdiction).

REASONS FOR GRANTING THE PETITION

The Seventh Circuit, as well as other courts of appeal, have decided an important question of federal law that conflicts with relevant decisions of this Court. Further complicating the issue, the circuits are split on the minutiae of this question, that is, exactly what constitutes an "adverse action," and the approach taken by the Seventh Circuit, in the context of employment discrimination cases, clashes -- for no apparent reason -- with the definition of what is actionable in the context

of the First Amendment rights of public employees.

This case presents an issue of broad importance to the enforcement of the two main federal employment discrimination statutes, Title VII and the ADEA. The Seventh Circuit and other circuit and district courts have imposed a requirement, not articulated in the text of either statute, that persons seeking to vindicate their rights under Title VII and the ADEA must prove not only that the employer discriminated against them for an unlawful reason, but also that the discrimination reached some unspecified critical mass of adversity.

The catchphrase for this requirement has been stated in various ways, including: "adverse employment action,"App., p. 4a; *Terry v. Ashcroft*, 336 F.3d 128, 138 (2d Cir. 2003); "adverse action," *id.*, "materially adverse employment decision;" *Williams v. Bristol-Myers Squibb*, 85 F.3d 270, 273 (7th Cir. 1996); and, "ultimate employment decision," *Ledergerber v. Stangler*, *supra*, 122 F.3d at 1144.[5] While the courts most often state

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[5]The adverse action requirement has been given different meanings depending on what part of Title VII or the ADEA is being enforced, *i.e.*, the prohibitions against discrimination, hostile work environment, or retaliation. Some courts use the term "materially adverse employment action" interchangeably with "tangible employment action," a concept articulated in *Burlington Indus. v. Ellerth*, 524 U.S. 742, 762 (1998) for the purpose of determining the applicability of the affirmative defenses to a sexual harassment claim. *See, e.g., Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 n.5 (6th Cir. 2000) Other courts distinguish between the two terms. *See, Suders v. Easton*, 325 F.3d 432, 434 n.1 (3d Cir.), *cert. granted*, ___ U.S. ___, 124 S.Ct. 803 (2003). In the context of retaliation, while one panel of the Seventh Circuit recently departed from the "adverse action" requirement in retaliation cases brought under Title VII, *Herrnreiter v. Chi.*

that the "adverse action" requirement is part of the prima facie case, *see, e.g., Terry v. Ashcroft, supra,* 336 F.3d at 138, the requirement has mushroomed into an overlay for the entire discrimination claim – an indispensable element to be established even in the presence of direct evidence of discrimination. *Monaco v. Fuddruckers, Inc.*, 1 F.3d 658, 660 (7th Cir. 1993).

Even if this Court holds that some adverse action is required, there is still an important issue to be resolved in terms of the level of adversity required to prove unlawful discrimination. The conclusion that transfers are not sufficiently adverse is inconsistent with both the Eleventh Circuit's decision in *Maddow* as well as this Court's decision in *Rutan v. Republican Party,* 497 U.S. 62 (1990), that transfers *are* adverse for public employees exercising their right to freedom of association. Therefore, if an adverse action requirement is read into Title VII and the ADEA, this Court must still decide the particulars of what employers can do before their discriminatory conduct is considered to be against the law.

Review is warranted in order to clarify the meaning of Title VII and the ADEA's prohibition against discrimination.

Hous. Auth., 315 F.3d 742, 745 (7th Cir. 2002) *cert. denied,* ___ U.S. ___, 124 S.Ct. 472 (Nov. 3, 2003), for another panel, the requirement remained, *Ajayi v. Aramark Bus. Servs.*, 336 F.3d 520, 533 (7th Cir. 2003).

I. This Court Should Review the Addition of a Requirement That Conflicts With the Plain Language of Title VII and the ADEA

The starting point for any analysis of Title VII and the ADEA is the statutory text. *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S. Ct. 2148, 2153 (2003). Title VII provides that it is an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a)(1) and (2).

The Age Discrimination in Employment Act contains the same prohibitions with regard to age discrimination. 29 U.S.C. § 623(a)(1) and (2); *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 584 (1978).

The text of both statutes is that discrimination in the terms, conditions, and privileges of employment and discrimination that limits, segregates, or classifies employees because of any one of a number of enumerated characteristics, is illegal. The phrase "terms, conditions, or privileges of employment" "evinces a congressional intent to 'strike at the entire spectrum of disparate treatment of men and women' in employment . . ." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). Thus, to require an "adverse action" is to ignore the words in the statutes and the meaning they were meant to convey.

The Seventh Circuit, rather than viewing the above-cited statutory language as conveying an intent to outlaw all forms of employment discrimination, holds that the text is a limitation on actionable discrimination. Its reasoning is that:

> Title VII does not forbid every act of invidious discrimination that an employer might commit against an employee; the act must be "with respect to [the employee's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). The cases paraphrase this either as "a tangible employment action," that is, "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," or as a

> "materially adverse employment action." *Herrnreiter v. Chi. Hous. Auth., supra,* 315 F.3d at 743-44 (internal citations omitted).

In requiring an "adverse action," not only are the courts ignoring or misinterpreting the words that appear in the statutes, they are inserting language where none exists. There is a ringing absence of any statutory language requiring an action that can be characterized as "adverse."

This Court has never so much as suggested that employees must prove discrimination *plus* an adverse action, and the language in the cases is to the contrary. The harm is the discrimination itself. Thus, recently in *AMTRAK v. Morgan,* 536 U.S. 101, 115-16 (2002), this Court stated that Title VII's prohibition against discrimination "is not limited to 'economic' or 'tangible' discrimination" echoing statements from early Title VII cases, including, "[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . ." *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 763 (1976); *see also, Trans World Airlines v. Hardison,* 432 U.S. 63, 71 (1977)("The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.")

The purpose of the statutes is to eradicate discriminatory *employer* conduct; the effect on a particular employee is immaterial, except for fashioning the remedy. In fact, different employees may be affected in different ways by the same employment decision. Thus, in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), this Court found a violation of Title VII where the employer assigned minority employees to drive city routes and kept them from transferring to over-the-road positions. Noting the district court's determination that over-the-road positions were more desirable, and arguably disagreeing with that conclusion, the Court stated, "Of course, Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another." *Id.*, at 338 n.18.

Notwithstanding the language of Title VII and the ADEA as well as this Court's statements about the meaning of that language, as the statutes have been interpreted by the Seventh Circuit, even had C.C. Services, in deciding that it did not want Ritcheson in its Vienna office because of her age and gender, gone so far as to put a sign on its door, "Women Need Not Apply For Transfer To This Office, This Site Reserved For Young Men,"[6] Ritcheson would be without a remedy, a result that should be avoided in the absence of a "clear congressional mandate," *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981).

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[6]The anomalous result of requiring an adverse action is demonstrated in this case, where the younger man, Ritcheson's competitor, was seeking a promotion to the position in question. Had he not gotten the promotion, he would have been able to claim that the decision was discriminatory, while Ritcheson could not challenge the selection.

II. Neither Title VII Nor the ADEA Permit Employers to Base Transfer Decisions on Age or Sex, Even If An "Adverse Action" Is Required

A. This Court Should Resolve The Conflict Between the Circuits As To Whether A Transfer Decision, Whether Forced or The Denial of a Transfer Opportunity, Can Violate Title VII or the ADEA

The Seventh Circuit held that a transfer decision is not actionable absent a showing of discrimination plus additional adverse consequences, *i.e.*, that the decision "significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted," App., p. 4a, *citing, Herrnreiter v. Chi. Hous. Auth., supra,* 315 F.3d at 744. The Eleventh Circuit, however, held that a forced transfer was an adverse action, never mentioning the need for adverse consequences beyond the transfer itself. *Maddow, supra,* 107 F.3d at 852-53.[7] Thus, there is a conflict as to whether the term "adverse action" includes denials of and involuntary transfers. Given the trend to

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[7]The Seventh Circuit attempted to reconcile this case with *Maddow*, but there is no material distinction. The courts regularly equate involuntary and voluntary transfer cases, as in this case where the court cited several involuntary transfer cases to support its statement that a lateral transfer cannot rise to the level of an adverse action. App., p. 4a. In *Maddow*, the employee was offered a transfer that she did not want; she did not take the transfer and claimed, successfully, that Procter & Gamble had constructively discharged her.

consolidate businesses[8] and move employees around in the process, as in *Maddow*, this issue will undoubtedly continue to be litigated, with courts – in the absence of a definitive ruling from this Court – being forced to examine the most minute details of each transfer decision to test for sufficient adversity.[9]

Resolution is particularly important in light of this Court's recent statement regarding the easy identification of discriminatory acts for the purpose of filing a timely EEOC charge. In *AMTRAK v. Morgan*, *supra*, 536 U.S. at 114, the Court held,

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice."

In light of *AMTRAK*, an aggrieved employee in a transfer case dare not wait more than 300 days to see if the employer's decision to deny him a transfer

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[8]*See*, *"The Relationship Between Competition, Competitiveness and Development,"* at ¶ 12, United Nations Conference on Trade and Development, July 2002. www.unctad.org/en/docs/c2clp30.en.pdf

[9]In *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 723 (1996), the Court rejected making such fine distinctions in the context of having to decide whether independent contractors were dependent on government contracts, such that the threat of losing business would be sufficient to coerce them to abandon political activities.

somehow affected his career. Instead, he must commence the legal process and find himself faced with the assertion that his claim is speculative.

B. This Court Should Resolve the Conflict with the First Amendment Authority That A Transfer Decision is an Adverse Action

In *Rutan v. Republican Party, supra,* 497 U.S. at 76, this Court held that job transfers based on political affiliation impermissibly infringed on the First Amendment rights of public employees. In so doing, the Court specifically rejected the Seventh Circuit's narrow view that only actions that were the substantial equivalent of a dismissal violated the First Amendment. *Id.*, at 67.

There is no reason to afford employees who are victims of discrimination less protection, with regard to the level of adversity they need to suffer in order to state a claim, than public employees who exercise their First Amendment rights. This Court recognized, in *Rutan,* that a transfer decision adversely affects employees, something the Seventh Circuit had not wanted to do. Indeed, in both the Seventh Circuit's decision in *Rutan* and in one of its most often cited "adverse action" cases under the ADEA, *Williams v. Bristol-Myers Squibb, supra,* nearly identical policy arguments underscored the decisions.

The Seventh Circuit's *Rutan* decision identified compelling "practical considerations" for limiting First Amendment claims:

> Recognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision. We doubt that there is a single disappointed employee who could not point to political disagreement, or simply lack of agreement between himself and a hiring official or the person who received the desired position. *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 953-54 (7th Cir. 1989).

The same practical considerations for limiting the ADEA are found in *Williams v. Bristol-Myers Squibb*, *supra*, 85 F.3d at 274:

> A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit (internal citations omitted).

Just as the practical considerations failed to carry the day in this Court's reversal of *Rutan*, the same should be true for transfer decisions under the ADEA and Title VII. There is nothing peculiar to freedom of association that justifies enhanced protection for public employees with regard to transfers. The First Amendment prohibits a public employer from treating people differently because of their political affiliations, just as Title VII and the

ADEA prohibit a private employer from treating people differently because of their race, color, religion, sex, national origin, or age. Treating people differently, as has been recognized by this Court in *Rutan*, includes transferring them; different treatment is what Congress made illegal in enacting Title VII and the ADEA.

CONCLUSION

For the reasons stated above the petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-1633

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DANA J. RITCHESON,
Plaintiff-Appellant,

v.

C.C. SERVICES, INCORPORATED
a/k/a Country Companies Insurance Company,
Defendant-Appellee.

October 1, 2003, Argued
October 30, 2003, Decided

COUNSEL: For Dana J. Ritcheson, Plaintiff - Appellant: Ferne P. Wolf, St. Louis, MO USA.

For C.C. SERVICES, INCORPORATED, also known as COUNTRY COMPANIES INSURANCE COMPANY, Defendant - Appellee: L. Lee Smith, HINSHAW & CULBERTSON, Peoria, IL USA.

JUDGES: Before Hon. Michael S. Kanne, Circuit Judge, Hon Ilana Diamond Rovner, Circuit Judge, Hon. Terence T. Evans, Circuit Judge.

OPINION: ORDER

Dana Ritcheson filed suit against her employer, C.C. Services, alleging discrimination and retaliation based

on her age and sex. She alleges that she was not selected for an open position because of discrimination, and that her supervisor retaliated against her when he yelled at her in a demeaning manner after she filed an EEOC charge regarding her discrimination claim. The district court granted summary judgment for C.C. Services on both claims. On appeal Ritcheson challenges only the denial of her discrimination claims, and specifically the district court's finding that she had not met the prima facie element of showing that she suffered a materially adverse employment action.

Ritcheson began working for C.C. Services, an insurance company, in 1979. She started working in southern Illinois, where she performed both claims processing and secretarial duties. In 1998 she was promoted to a position in Las Vegas, Nevada, where she worked as a claims adjuster for property loss. In June 2000 she applied for a lateral transfer (also for work as a claims adjuster) from Las Vegas to Vienna, Illinois. Ritcheson applied for the transfer because she believed that she would have a greater opportunity to advance into a management position in Vienna. C.C. Services, however, chose a 36-year-old male to fill the position over Ritcheson, who was 42 years old at the time.

The district court granted summary judgment on Ritcheson's retaliation claims, holding that Ritcheson could not show a retaliatory motive because her supervisor was unaware that she had filed an EEOC charge at the time he allegedly confronted her. The court, however, denied summary judgment on Ritcheson's discrimination claims. Characterizing C.C. Services's employment decision as "akin to a failure to

hire or promote," the court found that Ritcheson was complaining of a "tangible employment action" that was actionable under Title VII and the Age Discrimination in Employment Act.

Eleven days after the district court issued its order, we issued our opinion in *Grayson v. City of Chicago*, 317 F.3d 745 (7th Cir. 2003), holding that an employee who was denied a requested change in position could not establish a prima facie case of discrimination if he could not show that the denial constituted a "materially adverse employment action." The city's rejection of the employee's request to change positions was not an adverse employment action, we held, because the requested position "was identical to his present position in all but name." *Id.* at 750. In light of *Grayson*, C.C. Services moved to reconsider the district court's ruling.

Relying on *Grayson*, the district court granted summary judgment on Ritcheson's discrimination claims, holding that she could not show that she was materially adversely affected by the denial of the request to transfer. The court stated that in applying for the Vienna position, Ritcheson sought "essentially the same job" as the one she already held in Las Vegas.

We review de novo a district court's grant of summary judgment, viewing the evidence and drawing all reasonable inferences in the light most favorable to the non-moving party. *Franciski v. Univ. of Chicago Hosp.*, 338 F.3d 765, 768 (7th Cir. 2003).

On appeal Ritcheson primarily challenges the district court's finding that the two positions were essentially similar and, as a result, the denial of the transfer did

not constitute an adverse employment action. She asserts that the jobs were different, for example, because she would have more opportunity for promotion in Vienna.

A purely lateral transfer cannot rise to the level of an adverse employment action. *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). Similarly, "a transfer involving no reduction in pay and no more than a minor change in working conditions" does not constitute an adverse employment action. *Id.* An employee would be adversely affected, however, by a transfer that "significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted." *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002); *see also Hoffman-Dumbrowski v. Arlington Intern. Racecourse, Inc.*, 254 F.3d 644, 651 (7th Cir. 2001) (upholding district court's finding of adverse employment action where employee was transferred from a position where she scheduled hundreds of employees and prepared the payroll to one where she scheduled hundreds of employees and where she scheduled five employees and had minimal responsibility); *Dahm v. Flynn*, 60 F.3d 253, 257 (7th Cir. 1994) (upholding district court's finding of adverse employment action where most of employee's duties were reassigned and she was required to focus on routine matters demanding little skill).

We agree with the district court that Ritcheson cannot show that she would have experienced more than a minor change in working conditions as a result of the transfer. First, Ritcheson does not point to evidence in

the record to support her assertion that the transfer to southern Illinois would "enhance her career prospects." She mentions in her brief that Illinois had the largest number of supervisory personnel and that recommendations are made by the local managers. She does not, however, develop this argument nor substantiate these statements with references to the record. Even when asked at oral argument how her opportunities for advancement were compromised her counsel, who did a fine job on this difficult case, was unable to articulate a persuasive argument. Because the brief and Ritcheson's oral argument taken together do not give us an adequate basis on which to follow her argument, this argument fails. *See Albrechtsen v. Bd. of Regents of Univ. of Wisconsin Sys.*, 309 F.3d 433, 436 (7th Cir. 2002); *see also* FED. R. APP. P. 28(a)(9).

Ritcheson next raises the undeveloped argument that she would be required to handle more farm cases in Vienna, which tend to have larger case files than the residential cases she handled in Las Vegas. But Ritcheson has not presented evidence that working with larger case files would affect her working conditions in any significant manner. Without any explanation as to the significance of the larger case files in Vienna, Ritcheson cannot show that she suffered an adverse employment action on this basis.

Finally, Ritcheson cites *Maddow v. Procter & Gamble Co.*, 107 F.3d 846, 852-53 (11th Cir. 1997), to suggest that the denial of a change in geographic location constituted an adverse employment action. In *Maddow*, the Eleventh Circuit held that an older employee had suffered an adverse employment action when she was offered a position in Alabama after telling her

interviewer that she would accept a position only in Atlanta. 107 F.3d at 853. But *Maddow* involved facts that distinguish it from this case: there the employer was highly likely to offer the employee a job, despite knowing that she would work only in Atlanta. The court concluded that the employee had created an inference that the terms and conditions of her employment were affected because of her age, and that this was an "adverse affect." *Id.* By contrast, Ritcheson has not shown how the denial of her request to move to Vienna affected the terms and conditions of her work.

For these reasons, the judgment of the district court is affirmed.

No. 03-1633

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DANA J. RITCHESON,
Plaintiff-Appellant,

v.

C.C. SERVICES, INCORPORATED,
also known as Country Companies Insurance Company,
Defendant-Appellee.

Date: October 30, 2003

JUDGMENT – WITH ORAL ARGUMENT

Appeal from the United States District Court
for the Southern District of Illinois
No. 02 C 4034, G. Patrick Murphy, Chief Judge

BEFORE: Honorable MICHAEL S. KANNE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

CIVIL NO. 02-4034-GPM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DANA J. RITCHESON,
Plaintiff,

vs.

C.C. SERVICES, INC.,
a/k/a Country Companies Insurance Company,
Defendant.

Filed February 4, 2003

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

On January 17, 2003, this Court issued a Memorandum and Order denying Defendant's motion for summary judgment on Plaintiffs sex and age discrimination claims.fn1 In allowing these claims to go forward, the Court relied on language in Herrnreiter v. Chicago Housing Authority, No. 01-3202, 2002 WL 31886684, at *1 (7th Cir. Dec. 30, 2002), and found that Plaintiff complained of a tangible employment action. Thus, the Court found that Defendant's failure to hire/promote her for the Property Specialist I position in the Vienna, Illinois, office from that same position in the Las Vegas, Nevada, office is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through 2000e-17 and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 through 634. Defendant has filed a motion

to reconsider that ruling in light of the Seventh Circuit Court of Appeals' recent decision in Grayson v. City of Chicago, No. 01-2001, 2003 WL 175658 (7th Cir. Jan. 28, 2003). The Court heard arguments on the motion to reconsider, as well as on Defendant's motion in limine, on February 4, 2003.

In light of Grayson, this Court's January 17th ruling is no longer supportable. It is clear under Grayson that the proper inquiry in this case is whether Plaintiff suffered an adverse employment action. See Grayson, 2003 WL 175658, at *2. It is equally clear under Grayson that Plaintiff cannot make such a showing. See id. at *4. Having carefully considered the parties' arguments on the issue, for the reasons set forth on the record during the February 4th hearing, the Court cannot distinguish the facts in the current case from those in Grayson in any material way. It is true that in this case, Plaintiff sought a position in a different location, while in Grayson, the plaintiff's location would have remained the same had he been awarded the desired position. But in both cases, the employees sought essentially the same job that they held before and after the employment decision was made. Therefore, the rejection of their applications was not a materially adverse employment action. See id. at *3. Accordingly, summary judgment is appropriate because Plaintiff cannot establish a prima facie case of employment discrimination. See id. at *2.

For the foregoing reasons, Defendant's motion to reconsider is GRANTED, and this action is DISMISSED with prejudice. The parties shall bear their own costs. For the reasons expressed on the record during the February 4th hearing, the Court

makes a conditional finding that hedonic damages are not recoverable under the circumstances of this case.

IT IS SO ORDERED.

DATED this 4" day of February, 2003.

G. PATRICK MURPHY
Chief United States District Judge

Footnotes

fn1 The Court granted summary judgment on Plaintiffs retaliation claim.

CIVIL NO. 02-4034-GPM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DANA J. RITCHESON,
Plaintiff,

vs.

C.C. SERVICES, INC., a/k/a
Country Companies Insurance Company,
Defendant.

Filed January 17, 2003

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

Plaintiff files this employment discrimination case on February 8, 2002, claiming that she was discriminated and retaliated against on the basis of her sex and her age in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e through 2000e-17, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 through 634, respectively. This matter came before the Court on January 6, 2003, for a hearing on Defendant's motion for summary judgment (Doc. 38).

The standard applied to summary judgment motions filed under Federal Rule of Civil Procedure 56 is well-settled and has been succinctly stated as follows.

> Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether a genuine issue of material fact exists, [the court] must view the record in a light most favorable to the nonmoving party. Because the primary purpose of summary judgment is to isolate and dispose of factually unsupported claims, the nonmovant may not rest on the pleadings but must respond, with affidavits or otherwise, setting forth specific facts showing that there is a genuine issue for a trial. The evidence must create more than some metaphysical doubt as to the material facts. A mere scintilla of evidence in support of the nonmovant's position is insufficient; a party will be successful in opposing summary judgment only when it presents definite, competent evidence to rebut the motion.

Albiero v. City of Kankakee, 246 F.3d 927, 931-32 (7th Cir. 2001) (internal citations and quotations omitted).

Defendant argues that the position sought by Plaintiff was merely a lateral transfer and that the denial of such a transfer does not constitute an adverse employment action and, thus, is not actionable under the sex and age discrimination statutes. To come within the purview of

Title VII and the ADEA, an employer's action against an employee must be with respect to the employee's compensation, terms, conditions, or privileges of employment. 42 U.S.C. § 2000e-2(a)(1); 29 U.S.C. § 623(a)(1). "The cases paraphrase this either as a tangible employment action, that is, a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits, or as a materially adverse employment action." Herrnreiter v. Chicago Hous. Auth., No. 01-3202, 2002 WL 31886684, at *1 (7th Cir. Dec. 30, 2002)(internal quotations and citations omitted). Therefore, if the action of which Plaintiff complains is tangible, it need not be materially adverse, as argued by Defendant.

The Court regards the employment decision in this case akin to a failure to hire or promote. Plaintiff testified at her deposition that she sought the Property Specialist I position in the Vienna, Illinois, office because she believed that she would have more opportunities for promotion to a supervisory position if she was in an office in Illinois than if she remained in the Las Vegas, Nevada, office as the Property Specialist I (Doc. 39, Ex. A, 40:22 to 42:11). Whether her theory is correct is inapposite. She viewed the Vienna position as a move that would further her career, and she complains that she was denied that opportunity because of her sex and her age. Specifically, she contests Defendant's decision to fill the position with a younger and allegedly less qualified male. Under the facts of this case, the Court finds that Plaintiff is complaining of a tangible employment action; therefore, Defendant's failure to hire her for the Vienna, Illinois, position is actionable

under Title VII and the ADEA. Defendant's motion for summary judgment on these claims is denied.

Plaintiff's retaliation claim is based on an alleged confrontation with Don Sauzek, an agent of Defendant. The incident occurred when he reviewed some of Plaintiff's property files in the Las Vegas office several months after Plaintiff filed her charge with the Equal Employment Opportunity Commission (EEOC) and approximately one month after an unsuccessful attempt to mediate that charge. Defendant again argues that the alleged retaliatory conduct was not an adverse employment action. Notably, when questioned during the hearing, Plaintiff's counsel denied that Plaintiff is claiming constructive discharge. Alternatively, Defendant argues that Plaintiff cannot show retaliatory motive because Sauzek was not aware of the EEOC charge when he visited Plaintiff's Las Vegas office.

The Seventh Circuit Court of Appeals recently stated, in dicta, that retaliation does not have to involve an adverse employment action to be actionable under Title VII or other discrimination statutes. Herrnreiter, 2002 WL 31886684, at *3; see also Allen v. Chicago Transit Auth., No. 01-2101, 2001 WL 61292, at *3 (7th Cir. Jan. 6, 2003) ("It is the motive for, rather than the character of, the actions taken against the employee that determines whether the claim is one of retaliation."). This aside it is clear that knowledge of the protected activity is necessary in order to retaliate against a person for engaging in that protected activity. Sauzek attests that at the time of his visit to Las Vegas, he had no knowledge that Plaintiff had made or filed any employment discrimination charges against Defendant (Doc. 39, Ex. B, ¶ 12). Without more, Plaintiff's

supposition that Sauzek knew of the charges because his immediate supervisor was aware of them is insufficient to rebut Defendant's motion for summary judgment. Therefore, summary judgment is granted on Plaintiff's retaliation claim.

For the foregoing reasons and for those expressed on the record during the January 6th hearing, Defendant's motion for summary judgment (Doc. 38) is GRANTED in part and DENIED in part. Plaintiff's retaliation claim asserted in Count III of the Second Amended Complaint is dismissed; the sex and age discrimination claims asserted in Counts I and II, respectively, remain. The final pretrial conference remains set for Monday, January 27, 2003, at 1:30p.m. in the United States District Courthouse, 750 Missouri Avenue, East St. Louis, Illinois.

IT IS SO ORDERED.

DATED this 17th day of January, 2003.

G. PATRICK MURPHY
Chief United States District Judge

Excerpt of Deposition of ALLAN RAY KONEMANN
10/10

[Deposition Exhibits No. 5 & 6
were marked for identification.]

Q. (By Atty. Rhode) Let me see if I've got this in the right order. I've handed you what has been marked Deposition Exhibit 5, which is Bates-stamped RIT 10265 and 6; and then Deposition Exhibit 6, which is Bates-stamped RIT 10263 through 04. Are those the preinterview notes of Gary Ritchie that you reviewed prior to your interviewing the two candidates?

A. Yes.

Q. Where these documents provided to you directly by Mr. Ritchie?

A. Yes.

Q. Did he give you any instructions when he provided you copies?

A. No.

Q. Did you read each of these before you actually interviewed either of the candidates?

A. Yes.

Q. What, if any, influence these interview notes by Mr. Ritchie have on your interview process?

A. None.

Q. Did you make any recommendation after you interviewed both of the candidates as to which would be the better candidate for the position available in Vienna?

A. Yes.

Q. To whom did you make a recommendation?

A. Mr. Stephan.

Q. What did you tell him?

A. That in my opinion I would have preferred to have Ms. Ritcheson.

Q. Did you tell him why?

A. Yes. I explained that I have liked her overall experience.

Q. Was your conversation with Mr. Stephan in person or on the phone?

A. By phone.

Q. Was there one or more conversations with Mr. Stephan on the topic of your preferred candidate?

A. Just the one, as I recall.

Q. Approximately how long did that phone conversation take place?

A. I have no idea.

Q. Was it less than half an hour?

A. Oh. Yes

Q. And when you told – what else. If anything, did you tell Mr. Stephan besides you thought Dana had the better experience, if anything?

A. I don't recall anything else.

Q. And as we sit here today, do you recall what the relative experience of each of the candidates was, generally?

A. Generally, Dana had been with the company longer than Mr. Duncan. Ms. Ritcheson had some, you know, experience that she was in a property position at that particular time.

Q. Did you have knowledge as to how well she performed in the position as Property Specialist I in the Las Vegas office?

A. I talked to her supervisor.

Q. And that would have been Mr. Brennan?

A. That is correct.

Q. What did he tell you in terms of the quality of her work as a Property Specialist I?

A. As with any of these supervisors, it was good.

Q. If the people who worked for them weren't good, they wouldn't be there anymore: is that it? We hope.

A. That may be a supposition.

Q. That's okay. It's one we will accept. Why was the experience that Dana had important to you?

A. We were in the middle of a hailstorm.

Q. Is that literally? In your business it could be either.

A. Literally.

Q. And so she could hit the ground running in terms of the position, the Property Specialist I position that you needed to fill?

A. Yes. I was looking for experience.

Q. And what experience did Mr. Duncan bring?

A. Mr. Duncan, as I recall, had worked some property. He had construction experience, and I don't recall anything else at this point.

Q. Do you recall how long, approximately he had been with the company at that time?

A. I'm sorry. It may be in these notes here.

Q. That's okay, just if you recall.

A. No.

Q. Do you recall what position he held at the time he applied for the Property Specialist I position?

A. It was a field claims position, but I

* * *

of HR, correct?

A. Yes.

Q. And who is Joe Gibson?

A. He is the Director of Claims.

Q. And would he be Mr. Stephan's superior?

A. Yes.

Q. And is he in Springfield – I mean in Bloomington?

A. Yes.

Q. And Mr. Slattery you've already talked about. And is Ms. Klump the Director of Human Resources, if you know?

A. I don't know her title.

Q. In the fifth line you said, "I am told to be for this." Is that correct?

A. Yes.

Q. What do you mean by you were told to be for this?

A. I am told that I should be for this promotion.

Q. You were told by Mr. Stephan that you should be for this promotion?

A. Yes.

Q. Did he tell you why you should be for this promotion?

A. No.

Q. Then the next line, part of the line if I can read this correctly, "Be proactive and all that other company horse-shit."

A. Correct.

Q. What did you mean by that?

A. I don't honestly recall at this point.

Q. Then the next line you said, "I am told it is a good opportunity for young man." Is that what Mr. Stephan said to you?

A. As I recall, yes.

Q. The next part of the line, "and will fall on my shoulder to train him and make him productive"?

A. Productive.

Q. Then you went on to tell Mr. Stephan that you weighed his inexperience against him; is that right?

A. I weighed the experience against the lack of experience.

Q. So experience was the key factor for you in your recommendation?

A. Yes.

Q. In the second paragraph you said, "The meeting took place in the lobby of the IAA building."

A. Yes.

Q. What is the IAA building?

A. The Illinois Agriculture Association, which is –

Q. Now, the next line: "As always, am told to be discreet in handling this situation." Is that correct?

A. Yes.

Q. Did Mr. Stephan tell you – told you to be discreet?

A. Yes, I believe he did.

Q. And what did you understand that to mean?

ATTY. SMITH: I'll object to the form of the question insofar as it's asking for him to speculate as to what Mr. Stephan meant.

ATTY. RHODE: I'm only asking him what he understood it to mean.

A. I recall that you had to handle the situation just like you would handle a complaint in that Supervisor's position, as a discreet matter. I don't know how else to explain it. I'm sorry.

Q. That's okay. Had Mr. Stephan ever told you to be discreet with respect to any other personnel decision you had been involved in?

A. I can't say. I don't know.

Q. Did Mr. Stephan go on to tell you that he was talking to Human Resources about whether a Claims Representative II with duties or a Claims Representative III with duties would be a more appropriate level position for Mr. Duncan rather than the Property Specialist I?

A. As I recall, he said that he would have to check with them on how to assign the job title, whether it would be a II or a III.

Q. Just so I'm clear: The only job that was posted for application was a Property Specialist I?

A. Correct.

Q. That was the position Mr. Stephan indicated you should offer to Mr. Duncan, correct?

A. We offered a position to Mr. Duncan.

Q. Ultimately, the position he was offered was a Claims Rep III?

A. I presume. It would have been one of these two.

Q. So he wasn't offered the position he actually applied for, correct? He was never offered the Property Specialist I?

* * *

a bad memory and, you know, I don't recall exactly what our conversation was.

Q. All right. Let me – do you recall – and I'm not trying to put words in your mouth, I'm just trying to understand. You don't recall anything, other than the general. I wanted to make sure I'm not discriminating, as being part of the conversation that you had with her?

A. No, I don't.

Q. In the time that you've been the DCM, how many – how many employees have you selected?

A. Hmmm.

Q. Well, more than 10?

A. I would say probably 10 to 20.

Q. And every time that more than one person applied for a position and you were the – well, let me back up for a second. Were you the person who made the decision to hire Mike Duncan over Dana Ritcheson?
A. Yes.

Q. All right. And there are other positions, between 10 and 20, that you've made a decision of who to hire when there's been more than one candidate for a position?

A. Yes.

Q. And each of those circumstances, have you called Human Resources to say, I want to make sure I'm not discriminating?

A. I've had contact with Human Resources on 95 percent of the positions that I've been involved in.

Q. Okay. And in each of those that you can recall, did you ask them, am I discriminating against anybody when I make this decision?

A. Not that I recall.

Q. Was this – was this situation in Vienna then unusual in that respect, that you called to ask to make sure that you're not violating – that you're not discriminating?

A. I'm not sure what – what you're getting at here.

Q. Well, I'm trying to – I'm trying to determine if there was something unusual about these two candidates that made you call Human Resources to find out or to make sure that you weren't discriminating when you hired Mike Duncan over Dana Ritcheson.

A. I wouldn't say there would be.

Q. Was there some concern that you had more – some specific or general concern, other than I'm trying to make sure I don't discriminate?

A. Well, my concerns was that Dana's ability to do the job?

Q. What was your concern about Dana's ability to do the job?

A. With her limited experience and having prior knowledge of her work product when she worked in Du Quoin, as well as when she was working in Las Vegas.

Q. Okay, let's talk about that. What was her – why did you say Dana had limited work experience?

A. At which office?

Q. Well, you tell me. You just said I was concerned about her limited work experience.

A. Well, when she was employed in the Du Quoin office, here again I know she – I believe she was a – an Office Claims Rep., and Dana might be able to help me out there. I don't really recall if she was or not. Were you, Dana?

DANA RITCHESON: No.

A. You weren't, okay.

MR. SMITH: Hold it, just you.

MS. RHODE: Just to the best of your recollection.

A. Best of my recollection, okay, was that her exposure to the type of files that required this type of experience for this position was limited, and that she – I felt had questions about her ability to do the job.

Q. What questions did you have about her ability to do the job?

A. Her inexperience.

Q. Her inexperience?

A. Yes.

Q. Can you be more specific than that?

A. Her work product. The files themselves.

Q. Okay. What work product – what files themselves or work product are you referring to?

A. Well, she basically handled very minor type of property claims.

Q. When she was in Du Quoin?

A. Yes.

Q. Okay. What else did you – what other concerns did you have about Dana's ability to be a Property Specialist I in Vienna?

A. I just told you, that her inexperience and her ability to be able to handle the larger type files.

Q. And as far as you were aware, what's the

* * *

(2)

No. 03-1097

Supreme Court, U.S.
FILED
MAY 7 - 2004
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IN THE

Supreme Court of the United States

DANA J. RITCHESON,
Petitioner,

v.

CC SERVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

The parent corporations of respondent CC Services, Inc. are the Illinois Agricultural Association, Country Life Insurance Company, and Country Mutual Insurance Company. No publicly held company owns more than 10 percent of the stock of CC Services, Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

The petition for certiorari should be denied because it presents no issue worthy of this Court's attention. Although the petition claims a conflict, every Circuit to have addressed the question agrees with the Seventh Circuit that a purely lateral transfer, without more, cannot support a prima facie case of employment discrimination. And there is no other reason for this Court to review the decision below.

STATEMENT OF THE CASE

A. The Facts.

Dana J. Ritcheson was hired in 1979 by an affiliated company of CC Services. Pet. App. 2a. Ritcheson first worked in southern Illinois, where she performed both claims processing and secretarial duties. *Id.* In 1998, she was promoted to a Property Specialist I position – which

entailed working as a claims adjuster for property loss – in Las Vegas, Nevada. *Id.*; Second Am. Compl. ¶ 11. In June 2000, Ritcheson applied for a lateral transfer to a vacant Property Specialist I position in Vienna, Illinois. Pet. App. 2a; Second Am. Compl. ¶¶ 17-18.

The position for which Ritcheson applied in Vienna was identical to the position she already held in Las Vegas. As Ritcheson conceded at her deposition, the Vienna position had the same title, pay, benefits, duties, and responsibilities. *See* Ritcheson Dep. pp. 36-37, Ex. A to Def.'s S.J. Mot (S.D. Ill. filed Nov. 22, 2002). She further conceded that, had she been given the Vienna job, it would have been a lateral transfer. *Id.* at 37. Although Ritcheson argued below that her opportunities for future advancement would be greater were she in Vienna, Pet. App. 2a, the lower courts concluded that no evidence in the record supports that view. *Id.* at 4a-5a. To the contrary, the evidence demonstrates that advancement opportunities were equally available company-wide to all personnel, and that "[n]o employee has an advantage over any other employee for a supervisory position because of his or her geographical location." Statement of Joseph Gibson ¶ 3, Ex. C. to Def.'s S.J. Mot.

CC Services ultimately selected a 36-year-old male to fill the Vienna position. Pet. App. 2a. At that time, Ritcheson was 42 years old. *Id.*

B. District Court Proceedings.

After filing the requisite charge of discrimination with the EEOC, Ritcheson filed suit in the United States District Court for the Southern District of Illinois, alleging discrimination and retaliation on the basis of her sex and her age in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA). Ritcheson's discrimination claim was based solely

on the denial of her request for a lateral transfer. She based her retaliation claim on an allegedly unpleasant interaction with another employee of CC Services, Don Sauzek, who reviewed the insurance claims files assigned to Ritcheson several months after she filed her EEOC claim.

Following discovery, CC Services moved for summary judgment on all of Ritcheson's claims. On the discrimination claim, CC Services contended that the denial of a transfer from one position to an identical position was not sufficient to support a prima facie case, because denying such a lateral transfer was not a materially adverse employment action. *See* Def.'s S.J. Mot. at 4-5. In opposing summary judgment, Ritcheson did not contend that she had direct evidence of discrimination. Instead, she claimed only that she had sufficient indirect evidence to survive summary judgment under the burden-shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S 792 (1973). *See* Pl.'s Opp. to S.J. Mot. at 2 (S.D. Ill. filed Dec. 16, 2002) (citing Seventh Circuit cases setting forth prima facie elements of *McDonnell Douglas* test).

The District Court initially denied the motion for summary judgment with respect to Ritcheson's discrimination claim. It reasoned that the denial of a lateral transfer was a "tangible employment action" and was therefore actionable under Title VII and the ADEA, whether or not it adversely affected her conditions of employment. Pet. App. 13a.

The District Court granted summary judgment to CC Services on Ritcheson's retaliation claim. The District Court first noted that the Seventh Circuit had indicated in dicta "that retaliation does not have to involve an adverse employment action to be actionable." Pet. App. 14a (citing *Herrnreiter v. Chicago Transit Auth.*, 315 F.3d 742, 745 (7th Cir. 2002)). The District Court nevertheless rejected Ritcheson's

retaliation claim on the ground that there was no evidence that Sauzek, at the time he reviewed the insurance claims files assigned to Ritcheson, had any knowledge that she had made or filed any employment discrimination charges against CC Services. *Id.* (citing Statement of Don Sauzek ¶ 12, Ex. B to Def.'s S.J. Mot.). As the District Court recognized, "knowledge of the protected activity is necessary in order to retaliate against a person for engaging in that protected activity." *Id.*

After the Seventh Circuit issued *Grayson v. City of Chicago*, 317 F.3d 745 (7th Cir. 2003), CC Services made a motion for reconsideration with respect to Ritcheson's discrimination claim. In *Grayson*, the Seventh Circuit held that discrimination could not be inferred under *McDonnell Douglas* in the absence of a "materially adverse employment action." *Id.* at 748 (citing *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir. 1999)). *Grayson* further held that this requirement could not be met when the position denied to the plaintiff was "identical to his present position in all but name." *Id.* at 747, 750. Applying that decision to this case, the District Court concluded that Ritcheson "sought essentially the same job that [she] held before and after the employment decision was made." Pet. App. 9a. Accordingly, the District Court held she could not establish a prima facie case of employment discrimination and granted summary judgment to CC Services.

C. The Seventh Circuit's Decision.

Ritcheson appealed only the District Court's rejection of her discrimination claim. In an unpublished per curiam, the Seventh Circuit affirmed.

Consistent with the law in every Circuit to have reached the question, *see infra* pp. 6-9, the Seventh Circuit held that "[a] purely lateral transfer cannot rise to the level of an

adverse employment action" sufficient to support a prima facie case of employment discrimination. Pet. App. 4a (citing *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)). The Seventh Circuit acknowledged that "[a]n employee would be adversely affected, however, by a transfer that 'significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted.'" *Id.* (quoting *Herrnreiter*, 315 F.3d at 744).

The Seventh Circuit then ruled against Ritcheson on the facts of this case: "Ritcheson does not point to evidence in the record to support her assertion that the transfer to southern Illinois would 'enhance her career prospects.'" Pet. App. 4a-5a. Moreover, the Seventh Circuit held that Ritcheson had essentially waived that argument because she did "not . . . develop this argument nor substantiate these statements with references to the record." *Id.* at 5a. Accordingly, as the Circuit explained, "[b]ecause the brief and Ritcheson's oral argument taken together do not give us an adequate basis on which to follow her argument, this argument fails." *Id.* (citing *Albrechtsen v. Bd. of Regents of Univ. of Wis. Sys.*, 309 F.3d 433, 436 (7th Cir. 2002), cert. denied, 123 S. Ct. 2606 (2003); Fed. R. App. P. 28(a)(9)).

Finally, the Seventh Circuit distinguished this case from the only Circuit case with which Ritcheson's petition for certiorari claims a conflict. *See* Pet. at 13-14 (citing *Maddow v. Proctor & Gamble Co.*, 107 F.3d 846, 852-53 (11th Cir. 1997)). In *Maddow*, the Eleventh Circuit "held that an older employee had suffered an adverse employment action when she was offered a position in Alabama after telling her interviewer that she would accept a position only in Atlanta." Pet. App. 5a-6a. But, as the Seventh Circuit concluded, "*Maddow* involved facts that distinguish it from

this case: there the employer was highly likely to offer the employee a job, despite knowing that she would work only in Atlanta." Pet. App. 6a (citing *Maddow*, 107 F.3d at 853). "By contrast, Ritcheson has not shown how the denial of her request to move to Vienna affected the terms and conditions of her work." *Id.*

On January 27, 2004, Ritcheson filed a petition for certiorari. On March 24, 2004, this Court requested a response.

REASONS FOR DENYING THE WRIT

1. The facts of this case present no Circuit conflict. Ritcheson bases her discrimination claim solely on CC Services' refusal to transfer her to an identical position, with the same title, pay, duties, responsibilities, and opportunities for advancement as the position she already held. Relying solely on the *McDonnell Douglas* burden-shifting framework, Ritcheson sought to create a circumstantial case of discrimination even though she could not show that CC Services had adversely affected the terms and conditions of her employment in any way. Agreeing with every Circuit to have considered the question, the Seventh Circuit held that, without more, the refusal to grant such a purely lateral transfer could not support a prima facie case of discrimination. Pet. App. 4a-5a.

Indeed, the Circuits are unanimous that, for the denial of a transfer (or a forced transfer) to support a prima facie case of discrimination, it must entail some objectively negative employment-related consequence. As the District of Columbia Circuit observed in 1999, "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Brown v. Brody*, 199 F.3d 446, 455-57 (D.C. Cir. 1999) (federal Title VII claims) (citing cases;

internal quotation marks omitted); *see also, e.g., Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000) (ADEA); *Fallon v. Meissner*, 66 Fed. Appx. 348, 351-52 (3rd Cir. 2003) (unpublished table decision) (ADEA); *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 283-85 (5th Cir. 2004) (Section 1981); *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 885-87 (6th Cir. 1996) (Americans with Disabilities Act); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144-45 (8th Cir. 1997) (Title VII); *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 531-32 (10th Cir. 1998) (Title VII).[1] In adopting this position, these Circuits have relied upon Judge Posner's decision in *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996) announcing that very principle – making clear that the Seventh Circuit is in line with the other Circuits. *See, e.g., Brown*, 199 F.3d at 455.

Contrary to petitioner's assertion, *see* Pet. at 13-14, there is no conflict between the decision below and the Eleventh Circuit's 1997 decision in *Maddow v. Procter & Gamble Co.*, 107 F.3d 846 (11th Cir. 1997). To begin with, the Seventh Circuit expressly distinguished *Maddow* on the facts. Pet. App. 5a-6a. The Seventh Circuit thus may well have reached the same result as the Eleventh Circuit on the different facts in *Maddow*.

In any event, Ritcheson is wrong that a purely lateral transfer is in and of itself sufficiently adverse to support a prima facie case of discrimination in the Eleventh Circuit. *See* Pet. at 13. To the contrary, since *Maddow*, the Eleventh Circuit has made clear that, for a transfer to support a prima facie case of discrimination, the employee "must demonstrate that a reasonable person in his position would

---

[1] "Courts of appeals routinely apply the same standards to evaluate Title VII claims as they do ADA claims, ADEA claims, and even ERISA claims." *Brown*, 199 F.3d at 456 n.10.

have found his transfer to be adverse under all the facts and circumstances." *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1453 (11th Cir. 1998). The Eleventh Circuit thus rejected any notion that a transfer is always adverse or that it is adverse if the employee subjectively believes it to be. Instead, consistent with the law of other Circuits, the Eleventh Circuit held that the standard should be an objective one, and that a transfer to an objectively identical position cannot support a prima facie case of discrimination. *Id.* at 1449-50.

In reaching its conclusion, the Eleventh Circuit expressly relied upon Judge Posner's decision in *Williams*:

> Outside our own circuit, persuasive authority suggests even more strongly that we should use a reasonable person standard to determine whether a plaintiff has suffered an adverse employment action. The Seventh Circuit, in particular, has repeatedly declared that "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action."

Id. at 1449 (quoting *Williams*, 85 F.3d at 274 and citing favorably several other Seventh Circuit decisions). The Eleventh Circuit also relied on authorities from the Third, Sixth, Eighth, and Ninth Circuits, recognizing that "[s]everal other circuits . . . have agreed that a truly lateral transfer cannot be adverse." *Id.*; *see also id.* at 1450 ("[O]ur sister circuits have only held transfers to be adverse where the transfers were objectively equivalent, at least to some degree, to demotions.").

Notably, the Eleventh Circuit in *DeKalb County* expressly held that its decision was not inconsistent with its earlier opinion in *Maddow*. *Id.* at 1448-49 & n.13 (citing *Maddow*).

Indeed, the *DeKalb County* Court noted that the facts in *Maddow* would have supported a claim of age discrimination under its objective standard for an adverse employment action. *Id.* at 1452.

In short, the Eleventh Circuit's rule is the same as that of the Seventh Circuit, as well as of other Circuits that have addressed the question: transfers can be the basis for a claim of discrimination, but only if the employee can show some materially adverse employment consequence from the transfer or refusal to transfer. *Id.* at 1453 (citing Seventh Circuit decisions in *Williams* and *Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). Under the facts here – where Ritcheson failed to point to any adverse employment consequence from the denial of her transfer, Pet. App. 4a-5a – her claim would have met the same fate in the Eleventh Circuit as it did in the Seventh.[2]

2. Although the Circuits do appear to disagree with respect to the degree of adversity required to state a claim for *retaliation* under Title VII and the ADEA, this case does not present the question on which disagreement exists. Ritcheson did not appeal the District Court's rejection of her retaliation claim, Pet. App. 2a, and her petition concedes that her retaliation claim is not before this Court. Pet. at 5 n.3 ("Ritcheson sued for retaliation as well, but did not pursue that claim on appeal."). The Court thus should await a retaliation case to resolve any disagreement between the Circuits on this point.

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[2] The purported conflict with *Rutan v. Republican Party*, 497 U.S. 62 (1990), *see* Pet. at 15-17, likewise provides no basis for this Court's review. The fact that the *Rutan* Court determined that "transfers . . . based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees," *id.* at 75, sheds no light on the meaning of the anti-discrimination provisions in Title VII and the ADEA, and in no way conflicts with the decision below.

Retaliation claims and discrimination claims are distinct causes of action, grounded in different statutory text and different congressional policies. Unlike the core anti-discrimination provisions of Title VII and the ADEA, *see* 42 U.S.C. § 2000e-2(a)(1), (a)(2); 29 U.S.C. § 623(a)(1), (a)(2), the anti-retaliation provisions in those statutes do not limit the forbidden discrimination to the "terms, conditions, or privileges of employment." Instead, the anti-retaliation provisions simply state that it is unlawful to "discriminate against any . . . employees or applicants for employment . . . because he has opposed . . . an unlawful employment practice . . . or because he has made a charge" of discrimination. 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA). The Circuits have taken varying views with respect to the nature of the employment action required to trigger liability under these anti-retaliation provisions. *See, e.g., White v. Burlington Northern & Santa Fe Railway Co.*, No. 00-6780, __ F.3d __, 2004 WL 789726, *5-*13 (6th Cir. April 14, 2004) (en banc) (describing varying views); *id.* at *17-*24 (Clay, J., concurring) (same); *Ray v. Henderson*, 217 F.3d 1234, 1240-43 (9th Cir. 2000) (same). There may come a retaliation case in which the choice of standard makes a difference, and this Court may then want to review that case. But that hypothetical case would turn on this Court's interpretation of the text and purpose of the anti-retaliation provisions. The petition in this case – which does not even involve a retaliation claim – does not present that question.

3. Nor is there any need for this Court to review whether there is an "adverse action" requirement at all, *see* Pet. at 9-12, because the Seventh Circuit's conclusion that there is such a requirement is consistent with the conclusion of every Court of Appeals and is plainly correct. At the outset, Ritcheson does not even contend that the Circuits are divided on this point. *See id.* The uniformity among the

Circuits is unsurprising. By their terms, the anti-discrimination provisions of Title VII and the ADEA prohibit only "discrimination against" an individual with respect to hiring, firing, and the individual's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see* 42 U.S.C. § 2000e-2(a)(2) (prohibiting limiting, segregating, or classifying employees so as to "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee"); *see also* 29 U.S.C. § 623(a)(1), (a)(2) (same prohibitions with respect to age). These terms necessarily qualify the reach of the anti-discrimination provisions. *See EEOC Compliance Manual* § 8, "Retaliation," at 8-14 (May 20, 1998), available at http://www.eeoc.gov/docs/retal.html.[3] To fit within the statutory text, a plaintiff must show that her employer's actions have materially affected her "compensation, terms, conditions, or privileges of employment."[4] This limitation makes perfect sense. Otherwise, as Judge Posner has observed, "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams*, 85 F.3d at 274; *see also, e.g., Ledergerber*, 122 F.3d at 1144; *DeKalb County*, 145 F.3d at 1448.[5]

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[3] The EEOC's views on the meaning of these provisions, which the EEOC is empowered to enforce, are at least entitled to respect. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

[4] None of the cases from this Court cited by Ritcheson, *see* Pet. at 10-12, are to the contrary. Indeed, this Court has made clear that, to support a claim of discrimination, a plaintiff must show that her terms or conditions of employment have been affected. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 786-88 (1998).

[5] If, as Ritcheson suggests, *see* Pet. at 12, an employer placed a sign on its door to the effect that "Women Need Not Apply For Transfer to This

Requiring a materially adverse effect on the terms and conditions of employment is particularly appropriate where, as here, a plaintiff relies solely on the *McDonnell Douglas* burden-shifting framework. Absent such a requirement, a plaintiff without any direct proof of discrimination could create a presumption of discrimination even though the employer has done nothing to harm the individual. *See* 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 16 (3d ed. 1976) ("Establishing a prima facie case under the *McDonnell Douglas-Burdine-Hicks* model creates a presumption of illegal discrimination because it eliminates the most likely legitimate explanations for the employer's adverse action . . . ."). In the absence of an adverse action, an inference of discrimination would make no sense. That is doubtless why Courts of Appeals have uniformly interpreted the *McDonnell Douglas* framework to require proof of some materially adverse action with respect to the terms or conditions of a plaintiff's employment. *See, e.g., Pegram*, 361 F.3d at 281; *Galabya*, 202 F.3d at 639; *Bramble v. American Postal Workers Union*, 135 F.3d 21, 24-25 (1st Cir. 1998); *Kocsis*, 97 F.3d at 882.[6] Indeed, a leading employment law treatise describes "[t]he third prong of the prima facie case" as "whether the plaintiff suffered an adverse employment action." Lindemann & Grossman, *supra*, at 16 (Supp. 2002). And, of direct relevance here, it observes that "[c]ourts have held that a lateral transfer with no decrease in pay or benefits is not an adverse employment action . . . ." *Id.*

Office, This Site Reserved For Young Men," that would be a different case. Such a no-transfer policy for one subset of employees would affect the terms and conditions of employment.

[6] In many cases, adversity is self-evident, such as where the plaintiff has been terminated or demoted. *See DeKalb County*, 145 F.3d at 1448.

Here, the plaintiff relied solely on the *McDonnell Douglas* burden-shifting framework to defend against summary judgment. *See* Pl.'s Opp. to S.J. Mot. at 2.[7] She had no evidence to support her claim that the refusal to transfer would cause any adverse effect on her employment – indeed, the Seventh Circuit held that she essentially waived any such claim by failing on appeal to cite record evidence to support her arguments on that point. *See* Pet. App. 4a-5a. The courts below therefore properly granted summary judgment to CC Services, and nothing in their decisions warrants further review by this Court.[8]

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[7] Although petitioner now points to a stray comment by Leo Stephan of CC Services, Pet. at 4, she did not attempt to make out a "direct evidence" case of discrimination in the courts below nor did she contend that the comment was enough to defeat summary judgment. *See* Pl.'s Opp. to S.J. Mot. at 2; Br. of Appellant, No. 03-1633 (7th Cir. filed May 9, 2003); Reply Br. of Appellant, No. 03-1633 (7th Cir. filed June 24, 2003). It is too late to do so now. *See, e.g., United States v. Galletti*, 124 S. Ct. 1548, 1552 n.2 (2004). In any event, a claim that the Seventh Circuit overlooked any such evidence implicates at most mere error correction and does not merit this Court's review.

[8] There is no reason to hold this case pending the Court's resolution of *Pennsylvania State Police v. Suders*, No. 03-95. Resolution of the question presented in *Suders* – which involves whether a "constructive discharge" is a tangible employment action that could justify imposing vicarious liability on the employer – will in no way affect the decision below in this case. No one disputes here that the denial of the transfer was an action attributable to the employer. The question is whether that denial of a purely lateral transfer, without more, can support a prima facie case of employment discrimination.

CONCLUSION

The petition should be denied.

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

RESPONSE TO BRIEF IN OPPOSITION

CC Services raises several arguments in opposition to the Petition for a Writ of Certiorari which, to the extent not addressed in the Petition, are addressed below.

I. TRANSFERS ARE ADVERSE

There Is Circuit Conflict As Well As Conflict With This Court's Dictum in *AMTRAK*

CC Services claims there is no circuit conflict, attempting to explain away the Eleventh Circuit's decision in *Maddow v. Procter & Gamble Co.*, 107 F.3d 846 (11th Cir. 1997) in which the plaintiff established unlawful discrimination when her employer told her she was being transferred to an identical job in a different city. While the Seventh Circuit

distinguished *Maddow* in its opinion in this case, the only distinction it noted was that the Eleventh Circuit concluded that Maddow's transfer created an inference that her terms and conditions of employment would be affected. There were no factual distinctions in the transfers themselves. App., 5a-6a.

In focusing on what it claims is a lack of conflict among the circuits, CC Services disregards this court's authority in *AMTRAK v. Morgan,* 536 U.S. 101, 114 (2002) in which the court grouped "transfer denials" in the set of discrete acts such as termination, failure to promote, and refusal to hire, that were "easy to identify" for the purpose of knowing when to file a Charge of Discrimination. Neither does CC Services attempt to explain why "all practices in whatever form which create inequality in employment opportunity due to discrimination " at which the anti-discrimination laws were intended to strike does not include competitively bid transfers. *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 763 (1976).

Finally, in arguing that this court's decision in *Rutan* sheds no light on the meaning of the anti-discrimination provisions in Title VII and the ADEA, CC Services advocates the fiction that "adverse action" is a provision in those statutes. Those words do not appear in the statutes; rather, they comprise an element developed by the courts. *White v. Burlington Northern & Santa Fe Railway Co.,* 364 F.3d 789, 799 (6th Cir. 2004)(en banc).[1] There is nothing peculiar to cases brought under either the statutes or the First Amendment that would require "adverse action" to mean something different in each. *Stavropoulos v. Firestone,* 361 F.3d 610, 620 (11th Cir. 2004).

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[1] The element has developed from its own momentum, not unlike that which developed around another portion of Title VII where, until *Desert Palace v. Costa,* ___ U.S. ___, 123 S.Ct. 2148 (2003), many courts were reading a requirement into § 2000e-2(m) that did not exist—proof by direct evidence.

II. THE STATUTES DO NOT REQUIRE ADVERSE ACTION

As discussed above, in one of the cases cited by CC Services, *White v. Burlington Northern & Santa Fe Railway Co., supra,* 364 F.3d at 799, the Sixth Circuit acknowledged that there is no statutory basis for requiring an adverse action in either discrimination or retaliation cases under Title VII. While keeping the adverse action requirement for policy reasons (to "avoid lawsuits based on trivialities"), the Sixth Circuit abolished any distinction between the requisite level of adversity required to state a claim for discrimination, under § 2000e-2, and retaliation, under § 2000e-3, explaining, "Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute, which uses the same phrase 'discriminate against' in each of its anti-discrimination provisions."*Id.,* at 799.

III. THE SIGN ON THE DOOR

CC Services concedes in note 5 of its Brief in Opposition, that posting a sign on the door saying "Women Need Not Apply, This Office Reserved For Young Men," would be unlawful. In figurative terms, that is what happened and what Ritcheson established in opposition to summary judgment. Ritcheson reached the door of the Vienna, Illinois office but CC Services barred her from entering because of her age and sex. It does not matter, under Title VII or the ADEA, how she got to that door; all that matters is that CC Services would not let her in because she was an older woman.

Since CC Services admits that barring a person from the Vienna office because of age and gender is unlawful under the ADEA and Title VII, then it follows that CC Services must recognize that those courts which have interpreted the statutes to say that such conduct falls through the cracks of statutory coverage are wrong. Since the incorrect interpretation of Title VII and the ADEA, by CC Services's

admission, is widespread among the courts, CC Services cannot contest that this court's review is necessary and appropriate.

CONCLUSION

For the reasons stated in the Petition as well as those stated above, the Petition should be granted.

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